Supreme Court, U.S.
FILED
FEB 27 2007
OFFICE OF THE CLERK

No. 06-797

In the Supreme Court of the United States

UNITED STATES FOREST SERVICE, ET AL.,
PETITIONERS

v.

EARTH ISLAND INSTITUTE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

Page

I. The Ninth Circuit erred in relying upon extra-record declarations to find a likelihood of success on the merits 1

II. The Ninth Circuit erred in granting a preliminary injunction based on a "mere possibility" of irreparable harm 7

III. The Ninth Circuit's analysis of the balance of harms is tilted in favor of injunctive relief 9

TABLE OF AUTHORITIES

Cases:

AT&T Info. Sys., Inc. v. *GSA*, 810 F.2d 1233 (D.C. Cir. 1987) 5

Brown v. *Chote*, 411 U.S. 452 (1973) 7

Camp v. *Pitts*, 411 U.S. 138 (1973) 1, 2

Chaplaincy of Full Gospel Churches v. *England*, 454 F.3d 290 (D.C. Cir. 2006) 8

Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971) 2, 4

Cronin v. *USDA*, 919 F.2d 439 (7th Cir. 1990) 3, 4

DOT v. *Public Citizen*, 541 U.S. 752 (2004) 3

Doran v. *Salem Inn, Inc.*, 422 U.S. 922 (1975) 8

Environmental Def. Fund, Inc. v. *Costle*, 657 F.2d 275 (D.C. Cir. 1981) 4, 5, 6

Esch v. *Yeutter*, 876 F.2d 976 (D.C. Cir. 1989) 5

FPC v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976) 1

Greater Yellowstone Coalition v. *Flowers*, 321 F.3d 1250 (10th Cir. 2003) 8

Cases—Continued: Page

Greene/Guildford Envtl. Ass'n v. *Wykle*, 94 Fed. Appx. 876 (3d Cir. 2004) 4
James Madison Ltd. ex rel. Hecht. v. *Ludwig*, 82 F.3d 1085 (D.C. Cir. 1996), cert. denied, 519 U.S. 1077 (1997) 5
Lee v. *United States Air Force*, 354 F.3d 1229 (10th Cir. 2004) 6
Marsh v. *Oregon Natural Res. Council*, 490 U.S. 360 (1989) 2
MicroStrategy, Inc. v. *Motorola, Inc.*, 245 F.3d 335 (4th Cir. 2001) 9
Murphy v. *Commissioner*, 469 F.3d 27 (1st Cir. 2001) 4
National Audubon Soc'y v. *Department of the Navy*, 422 F.3d 174 (4th Cir. 2005) 5
National Audubon Soc'y v. *Hoffman*, 132 F.3d 7 (2d Cir. 1997) 6
Newton County Wildlife Ass'n v. *Rogers*, 141 F.3d 803 (8th Cir. 1998) 4
North Bulkhead Civic Ass'n v. *Skinner*, 903 F.2d 1533 (11th Cir. 1990) 5
Northeastern Fla. Chap. of the Ass'n of Gen. Contractors of Am. v. *City of Jacksonville*, 896 F.2d 1283 (11th Cir. 1990) 7
Norton v. *Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) 10
Preserve Endangered Areas of Cobb's History, Inc. v. *United States' Army Corps of Eng'rs*, 87 F.3d 1242 (11th Cir. 1996) 5
Reynolds Metals Co. v. *FERC*, 777 F.2d 760 (D.C. Cir. 1985) 7

Cases—Continued: Page

Schrier v. *University of Colo.*, 427 F.3d 1253 (10th Cir. 2005) 8
Shanks v. *City of Dallas*, 752 F.2d 1092 (5th Cir. 1985) ... 8
Siegel v. *LePore*, 234 F.3d 1163 (11th Cir. 2000) 7
Sierra Club v. *United States Army Corps of Eng'rs*, 771 F.2d 409 (8th Cir. 1985) 4
Speaks v. *Kruse*, 445 F.3d 396 (5th Cir. 2006) 8
Touchston v. *McDermott*, 234 F.3d 1130 (11th Cir. 2000) 8
United States v. *Akzo Coatings of Am., Inc.*, 949 F.2d 1409 (6th Cir. 1991) 5
Valley Citizens for a Safe Env't v. *Aldridge*, 886 F.2d 458 (1st Cir. 1989) 4
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978) 2, 3
Voyageurs Nat'l Park Ass'n v. *Norton*, 381 F.3d 759 (8th Cir. 2004) 4
Washington Metro. Area Transit Comm'n v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) 7
Wisconsin Gas Co. v. *FERC*, 785 F.2d 669 (D.C. Cir. 1985) 7

Statutes and regulation:

Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 1
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 2
28 U.S.C. 1292(a)(1) 8
40 C.F.R. 1502.24 3

Miscellaneous: Page

Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park's Requirement of Judicial Review "On the Record,"* 10 Admin. L.J. Am. U. 179 (1996) ... 2

REPLY BRIEF FOR THE PETITIONERS

The Ninth Circuit's decision in this case represents a dramatic departure from this Court's model for judicial review of agency action. The court awarded preliminary injunctive relief on the basis of assertions made in litigation affidavits and the "mere possibility of irreparable harm" (Pet. App. 15a), and it undertook a skewed balancing of harms and the public interest that furnishes a formula for the automatic granting of preliminary injunctions in land-use cases. Because this case presents important issues on which the circuits are divided—and because the Ninth Circuit's decision can be expected to have broadly adverse consequences for the administration of the more than 300 million acres of Forest Service and Bureau of Land Management lands in that circuit (see Pet. 29)—review by this Court is warranted.

I. The Ninth Circuit Erred In Relying Upon Extra-Record Declarations To Find A Likelihood Of Success On The Merits

1. This Court has repeatedly held that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (brackets omitted) (quoting *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam)); see Pet. 15. Respondents nevertheless assert (Br. in Opp. 5-11) that the court of appeals' detailed consideration of expert declarations submitted by respondents for the first time in court was no more than a routine application of a settled rule under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Respondents are wrong. By approving litigation declarations based on nothing more than the passing assertion that a court may do so to "determine whether the agency has considered all relevant factors and has explained its decision," Pet. App. 22a (citation omitted), the Ninth Circuit effectively trans-

formed a narrow exception into an open door that would allow a plaintiff to submit post-decision expert declarations and obtain de novo judicial review of the correctness of the agency's decision whenever it claims that an agency's analysis of a complex issue is incorrect.

This Court has never approved resort to non-record declarations submitted by parties challenging an agency's decision under the APA. See Pet. 16-17. In the absence of a strong showing of bad faith, which respondents have not even alleged here, the Court has recognized only a narrow exception allowing the reviewing court to obtain a supplemental explanation *from the agency* in those unusual circumstances when the record is so inadequate that the reviewing court cannot understand the agency's decision or the basis of the decision. Pet. 16 (citing *Pitts*, 411 U.S. at 142-143, and *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971)).

2. Respondents contend (Br. in Opp. 6-8) that the courts of appeals, "particularly in NEPA cases," have generally broadened this exception in a manner that supports what the Ninth Circuit did here. If respondents were correct, those courts would have gone far beyond anything *Pitts* and *Overton Park* permitted. See Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park's Requirement of Judicial Review "On the Record"*, 10 Admin. L.J. Am. U. 179, 246 (1996) ("The Supreme Court's vision of administrative law, at least since *Overton Park*, has been incompatible with such an [extra-record evidence] exception."). Nothing in the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, carves out an exception to those standards of judicial review under the APA. See *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 375-378 (1989); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553-555 (1978). And a rule permitting the practice authorized by the Ninth Circuit in this case would also conflict with

DOT v. *Public Citizen*, 541 U.S. 752, 764-765 (2004), which reaffirmed the requirement under *Vermont Yankee*, 435 U.S. at 553, that parties challenging agency compliance with NEPA must make their case to the agency during the administrative process.[1]

In fact, however, other courts of appeals have not endorsed the broad exception respondents posit.

a. In the first place, the Ninth Circuit's expansive exception to the review-on-the-record rule squarely conflicts with the Seventh Circuit's decision in *Cronin* v. *USDA*, 919 F.2d 439 (1990) (Posner, J.), a NEPA case also involving the Forest Service. There, the court held that the district court erred in providing for an evidentiary hearing when "the agency embodied its decision and reasons in a substantial document." *Id.* at 444. The Seventh Circuit explained that a federal court must confine itself "to the record compiled by the administrative agency" because "it is imprudent for the generalist judges * * * to consider testimonial and documentary evi-

---

[1] Respondents mistakenly contend (Br. in Opp. 8 n.12) that the court of appeals decision is "easily reconciled" with *Public Citizen*, because respondents' experts, while they submitted comments to the agency on the problems with reliance on tree mortality guidelines, lacked the opportunity to comment on the "particular guidelines chosen by the Forest Service." First, the court of appeals did not base its reliance on respondents' declarations on the experts' alleged inability to comment in the administrative process. Second, respondents, in fact, commented extensively on *proposed* tree mortality guidelines. The fact that they did not comment on the particular guidelines finally chosen (which were *more conservative* than the guidelines respondents addressed) does not, in any event, provide a basis under *Public Citizen* or any other decision of this Court for departing from the review-on-the-record rule. Nothing in the APA or NEPA requires an opportunity to comment on all evidentiary materials on which the agency relied. Regulations require public participation in consideration of a draft environmental impact statement (EIS), one purpose of which is to afford the agency the opportunity to respond to comments by gathering new information or revising its conclusions. See 40 C.F.R. 1502.24 (agencies shall ensure scientific integrity of the EIS). *Vermont Yankee* bars the reviewing court from imposing any additional obligations on the agency, especially to conduct repeated rounds of public comment.

dence be[illegible] on [technical] questions unless the evidence has first been presented to and considered by the agency." *Ibid.* The court thus held that resort to extra-record materials would be permitted "only if there is no record and no feasible method of requiring the agency to compile one in time to protect the objector's rights—in short, only (to repeat) if there is an emergency." *Ibid.* The Eighth Circuit has announced a similar rule. See *Newton County Wildlife Ass'n* v. *Rogers*, 141 F.3d 803, 807 (1998) (when there is "a contemporaneous administrative record and no need for additional explanation of the agency decision, 'there must be a strong showing of bad faith or improper behavior' before the reviewing court may permit discovery and evidentiary supplementation of the administrative record") (quoting *Overton Park*, 401 U.S. at 420); accord *Voyageurs Nat'l Park Ass'n* v. *Norton*, 381 F.3d 759, 766 (8th Cir. 2004) (exception is "very narrow").[2]

b. Decisions from a number of other circuits cited by respondents likewise lend no support to the Ninth Circuit's approach. For example, although the First Circuit, in *Valley Citizens for a Safe Environment* v. *Aldridge*, 886 F.2d 458, 460-461 (1989) (Breyer, J.), discussed in dicta certain circumstances in which a court might want to accept additional evidence in a NEPA case, it rejected any basis for doing so in that case; and the First Circuit held in a very recent (non-NEPA) case that the only two exceptions are those permitted under *Overton Park* for when there is an inadequate agency explanation or bad faith, see *Murphy* v. *Commissioner*, 469 F.3d 27, 31 (2006). In *Greene/Guilford Environmental Ass'n* v. *Wykle*, 94 Fed. Appx. 876, 878-879 (2004), the Third Circuit

---

[2] Respondents err in relying (Br. in Opp. 7) on the Eighth Circuit's earlier decision in *Sierra Club* v. *United States Army Corps of Eng'rs*, 771 F.2d 409, 413 (1985). The Eighth Circuit there stated that the administrative record may be supplemented in narrow circumstances by evidence "of an explanatory nature" only, citing, *inter alia*, *Environmental Def. Fund, Inc.* v. *Costle*, 657 F.2d 275, 285-286 (D.C. Cir. 1981) (discussed at pp. 5-6, *infra*).

expressly *adhered* to the rule articulated in *Overton Park* and simply sustained the *agency's* submission to explain its decision. In *National Audubon Society* v. *Department of the Navy*, 422 F.3d 174 (2005), the Fourth Circuit sustained the admission of evidence, but explained only that "there may be circumstances to justify expanding the record or permitting discovery" without spelling out what those circumstances are. *Id.* at 188 n.4 (citation omitted). In *North Buckhead Civic Ass'n* v. *Skinner*, 903 F.2d 1533, 1539, 1543 (1990), the Eleventh Circuit affirmed without addressing the propriety of the evidentiary hearing conducted by the district court; and in a subsequent decision the Eleventh Circuit identified only certain narrow exceptions to the administrative-record rule and found none applicable, see *Preserve Endangered Areas of Cobb's History, Inc.* v. *United States Army Corps of Eng'rs*, 87 F.3d 1242, 1246 n.1 (1996).[3]

Finally, the District of Columbia Circuit, while occasionally stating in dicta that certain circumstances might allow consideration of additional evidence, has actually allowed it only in narrow circumstances. See *James Madison Ltd. ex rel. Hecht* v. *Ludwig*, 82 F.3d 1085, 1095-1096 (1996) (no "unusual circumstances" justified additional evidence; record not "in any respect inadequate"), cert. denied, 519 U.S. 1077 (1997); *Esch* v. *Yeutter*, 876 F.2d 976, 991 (1989) (allowing evidence to show procedural errors that caused agency not to consider relevant factors); *AT&T Info. Sys., Inc.* v. *GSA*, 810 F.2d 1233 (1987) (per curiam) (rejecting reliance on agency declaration); *Environmental Def. Fund, Inc.* v. *Costle*, 657 F.2d 275, 285-286 (1981) (rejecting affidavits because not from agency personnel). In particular, the District of Columbia Circuit has not overruled its rejection in *Costle* of "an exception which would enable challenging parties to submit affidavits addressing the

---

[3] See also *United States* v. *Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1427-1429 (6th Cir. 1991) (allowing affidavit with new information in special CERCLA consent decree context).

merits and propriety of the agency decision," on the ground that to do so "would be contrary to decisions of the Supreme Court." *Id.* at 286. The Ninth Circuit's decision cannot be squared with that holding.

c. Even those courts of appeals that have articulated a somewhat broader exception for NEPA cases have nonetheless made clear that they will permit extra-record materials only in "limited" or "very narrow" circumstances. They have never permitted their use simply to attack the correctness of the agency's decision, as the Ninth Circuit did here. See, *e.g.*, *National Audubon Soc'y* v. *Hoffman*, 132 F.3d 7, 15 (2d Cir. 1997) (permitting extra-record materials in NEPA cases only in the "limited" situation in which "the administrative record is so inadequate as to prevent the reviewing court from effectively determining whether the agency considered all environmental consequences of its proposed action"); *Sierra Club* v. *Peterson*, 185 F.3d 349, 369-371 (5th Cir. 1999) (administrative record was "entirely inadequate"), vacated on other grounds on rehearing en banc, 228 F.3d 559 (2000), cert. denied, 532 U.S. 1051 (2001); *Lee* v. *United States Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004) (submission permitted only in "extremely limited" circumstances).

Here, the court of appeals did not require respondents to show that the administrative record was so inadequate that the court could not understand the basis for the agency's decision, and it made no finding that it was. The record clearly shows that the Forest Service gave detailed consideration to both the reliability of the tree mortality guidelines and potential project impacts upon the California spotted owl (CASPO) in the Final Environmental Impact Statements and supporting documents.[4] This Court should grant review to bring the Ninth Circuit back into line with this Court's requirement

---

[4] See Pet. 5, 8-10, 17; C.A. E.R. Tab 8, at 57, 59-61, 195-196, 201-202; Tab 9, at 75-77, 201-206, 520-521; C.A. Supp. E.R. Tab A at 73-74, 184-187, 415-417; Tab E at 225-231; Tab O at 15-18.

that review of an agency decision be on the administrative record.

II. The Ninth Circuit Erred In Granting A Preliminary Injunction Based On A "Mere Possibility" Of Irreparable Harm

Contrary to respondents' contention (Br. in Opp. 20-25), the Ninth Circuit's express rejection of the requirement that a plaintiff seeking a preliminary injunction show at least a "significant risk" of irreparable harm conflicts with decisions of many other courts of appeals, which have *held* that a mere possibility of harm is insufficient. Because "a showing of irreparable injury is 'the sine qua non of injunctive relief,'" *Siegel* v. *LePore*, 234 F.3d 1163 (11th Cir. 2000) (en banc) (per curiam) (quoting *Northeastern Fla. Chap. of the Ass'n of Gen. Contractors of Am.* v. *City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990)), and because the conflict is not merely "semantic" (Br. in Opp. 25), review clearly is warranted.[5]

The District of Columbia Circuit has not "approve[d]" (Br. in Opp. 24) the Ninth Circuit's standard. To the contrary, that court has held that the movant must show "that irreparable injury is 'likely' to occur," *Wisconsin Gas Co.* v. *FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) (quoting *Washington Metro. Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841, 845 (D.C. Cir. 1977)). See *Reynolds Metals Co.* v. *FERC*, 777 F.2d 760, 763 (D.C. Cir. 1985) (Scalia, J., joined by R.B. Ginsburg, J.) (*Wisconsin Gas* "emphasized the

[5] As explained in the petition (at 20-21), this Court on several occasions has made clear that a plaintiff must show more than a mere possibility of harm. Respondents erroneously contend (Br. in Opp. 17) that *Brown* v. *Chote*, 411 U.S. 452 (1973), supports the Ninth Circuit's "mere possibility" standard. In discussing the procedural background of the case, the Court merely observed that the district court had properly considered the "relevant factors," one of which was "the possibility that irreparable injury would have resulted." *Id.* at 456. In addressing the propriety of a preliminary injunction, however, the Court held that it could not "conclude that the court's action was an abuse of discretion" because "[the plaintiff's] opportunity to be a candidate *would have been foreclosed*, absent some relief." *Id.* at 457 (emphasis added).

stringency of the requirement that irreparable injury be 'likely' to occur"). *Wisconsin Gas* itself involved a request for a stay, but the District of Columbia Circuit has since applied its "high standard for irreparable injury" to preliminary injunctions. *Chaplaincy of Full Gospel Churches* v. *England*, 454 F.3d 290, 297 (2006).

Similarly, in *Shanks* v. *City of Dallas*, 752 F.2d 1092 (1985), the Fifth Circuit explained that a plaintiff seeking a preliminary injunction must "prove a substantial threat that he will suffer irreparable harm" and held that, for purposes of obtaining interlocutory review under 28 U.S.C. 1292(a)(1), "it is clear that the mere possibility of harm is not sufficient." *Id.* at 1096-1097; accord, *e.g.*, *Speaks* v. *Kruse*, 445 F.3d 396, 399 (5th Cir. 2006) (requiring "a substantial threat of irreparable injury"). In *Greater Yellowstone Coalition* v. *Flowers*, 321 F.3d 1250, 1258 (2003), the Tenth Circuit "agree[d] with those circuits that consider a significant risk of harm sufficient" and characterized the "'significant risk' standard" it adopted as "not an easy burden to fulfill." That court subsequently rejected a claim for preliminary relief because nothing in the record "show[ed] actual or significant risk of [irreparable] loss." *Schrier* v. *University of Colo.*, 427 F.3d 1253, 1267-1268 (2005). The Eleventh Circuit's approach likewise is in conflict with the Ninth Circuit's, because it requires a "substantial threat," not a mere possibility of irreparable harm. *Siegel*, *supra*. In fact, in *Siegel* the court explained that its "substantial 'threat'" formulation might even understate the requisite standard as "stated by the Supreme Court—that a plaintiff must show either that he will suffer, or faces a substantial likelihood that he will suffer, irreparable injury." 234 F.3d at 1176 n.9 (citing *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975)); see *Touchston* v. *McDermott*, 234 F.3d 1130, 1133 (11th Cir. 2000) (en banc) (per curiam) (rejecting plaintiffs' request for injunction pending appeal because they failed to "demonstrate[] a substantial threat of irreparable injury").

The clear conflict on the irreparable harm standard merits this Court's review. As explained in the petition (at 24-26), the different tests are not a matter of mere "semantic[s]" (Br. in Opp. 25). The gap between "mere possibility" and "substantial likelihood," especially in the context of a test applied as frequently as the "familiar four-factor test," *MicroStrategy, Inc.* v. *Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001), will produce different results. The different outcomes in the district court and the court of appeals in this very case illustrate the point. In discussing irreparable injury, the Ninth Circuit relied only on injury to several species of birds. See Pet. App. 33a, 55a. Yet the court nowhere explained how the two projects' effects on burned forest habitat would cause irreparable harm to the viability of those species in the area.

III. The Ninth Circuit's Analysis Of The Balance Of Harms Is Tilted In Favor Of Injunctive Relief

It is clear from the administrative record that one purpose in choosing the selected alternative was to leverage the value of the marketable timber so that the purchaser would remove timber that adds to the fuel load, conduct slash treatment to protect soils, repair roads, and perform other restoration activities—all at the purchaser's expense. Pet. App. 90a, 119a. If the contractor cannot remove the remaining marketable timber, it cannot obtain the value it received as consideration for agreeing to perform those beneficial actions, and important benefits for the forest will therefore be lost.

Respondents defend the court of appeals' balancing of the harms and the public interest on the grounds that they merely had to show a "possibility" of irreparable harm (Br. in Opp. 15 & n.21) and that "logging itself constitutes irreparable harm," while the losses from foregone timber sales are merely economic and "not typically irreparable" (*Id.* at 27). The court of appeals' and respondents' approach, however, is a formula for an automatic injunction in cases challenging logging projects, because those projects will always be found to threaten irrep-

arable harm if all that need be shown is a possibility that the habitat of some species may be affected by the project. See Pet. App. 55a (citing the "possibility" that logging "may result * * * in harm to the [CASPO], and in harm to several MIS bird species"). And the asserted interest in avoiding that possibility—the only "public interest" the court of appeals credited—will typically be found to outweigh the interest in forest restoration, improving the forest, and preventing future fires, where those interests are effectuated by generating revenue from timber sales, an objective the court of appeals deemed categorically subordinate to avoiding the possibility of harm to species habitat. *Ibid.* The court of appeals' oversimplified approach ignores the statutory mandate to the expert agency to balance the "many competing uses to which land can be put," *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004), and the public interest in respecting the balance the agency has struck. That ruling by the Ninth Circuit therefore also warrants review by this Court.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

FEBRUARY 2007